130-416

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 236.

J. FRIEDLANDER, HERMAN LEOPOLD, AND HENRY VIAVANT, COMPOSING THE FIRM OF J. FRIEDLANDER & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED MARCH 20, 1886.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 26, 1889.

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[Seal United States Circuit Court, Eastern District of Texas.]

1 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

J. FRIEDLANDER & Co.
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } Law. No. 1323.

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular November term of said court, 1885, to wit, on the 20th day of November, A. D. 1885, the Honorable Don A. Pardee, judge of the circuit court of the United States for the fifth circuit, presiding, the following proceedings were had and taken in said court, to wit:

2 *Transcript from State Court. Filed M'ch* 2, 1885.

J. FRIEDLANDER & Co.
v.
TEXAS & PACIFIC R'Y Co. } No. 12053. Transcript.

(Index omitted in printing. See general index.)

THE STATE OF TEXAS, *County of Galveston:*

At a term of the district court begun and holden at Galveston, within and for the county of Galveston, before the Hon. Wm. H. Stewart, and ending on the 29th day of November, A. D. 1884, the following case came on for trial, to wit:

J. FRIEDLANDER & Co., Plaintiffs,
vs.
TEXAS & PACIFIC R'Y Co., Defendant. } No. 12053.

3 *Plaintiffs' Original Petition. Filed Aug.* 26, 1884.

In the District Court of Texas, in and for the County of Galveston.

J. FRIEDLANDER & Co.
vs.
TEXAS & PACIFIC RAILWAY Co. } No. —.

To the Honorable Wm. H. Stewart, judge of the district court of Galveston county:

The petition of J. Friedlander, Herman Leopold, and Henry Viavant, all of whom reside in the city of New Orleans, in the State of Louisiana, and at the times and in the matters hereinafter mentioned were and still are partners doing business in the city of New

Orleans aforesaid under the firm name and style of J. Friedlander & Co., plaintiffs, against The Texas & Pacific Railway Company, a private corporation created by an act of Congress of the United States and existing in the State of Texas under said act and by authority of the laws of said State, and having its legal domicil and principal office at Marshall, in the county of Harrison, in said State, defendant, respectfully shows that the said defendant corporation has an agent and representative in the county of Galveston, in which said county the local agent representing said corporation is W. H. Newman, who resides in the county of Galveston; that heretofore, to wit, on the 6th day of November, 1883, the said defendant corporation, by and under authority of its said charter and the laws of the State of Texas, was and still is doing business as a public and common carrier for hire and reward of passengers and freight upon and over its railway from Sherman, in the county of Grayson, in the said State of Texas, and over other lines
4 connected therewith, easterly to the city of New Orleans aforesaid, and was engaged in transporting for hire and reward produce and commodities of all sorts from Sherman aforesaid to New Orleans aforesaid; that in the course of its said business as said common carrier said defendant, at Sherman aforesaid, on the said 6th day of November, 1883, by and through one E. D. Easton, who was then and there by the said defendant thereunto fully and lawfully authorized, received of and from one Joseph Lahnstein, for transportation and carriage from Sherman aforesaid to New Orleans aforesaid for hire and reward, 200 bales of cotton, marked and weighing as follows, to wit:

100 bales, marked H A K, weighing 51,000 pounds, and 100 other bales, marked P E T, and weighing 50,000 pounds, which said cotton was then and there of the reasonable value of fifteen thousand dollars, and the said defendant, by and through its said agent, E. D. Easton, who was then and there by the said defendant thereunto lawfully and fully authorized, in consideration of the receipt of said cotton as aforesaid, for transportation as aforesaid, and in consideration of freight and reward to be to the said defendant paid thereon at the rate of 60 cents per hundred pounds, executed and delivered to the said Joseph Lahnstein its, the said defendant's, certain bill of lading, dated November 6th, 1883, in and by which said bill of lading the said defendant agreed, undertook, promised, and contracted with the said Joseph Lahnstein to carry and deliver
5 said 200 bales of cotton at New Orleans aforesaid to the order of the said Joseph Lahnstein.

That thereafter, to wit, on the said 6th day of November, 1883, according to the usage and customs of merchants and shippers of cotton at the times and places aforesaid, the said Joseph Lahnstein endorsed the said bill of lading by writing his name across the back thereof, and, for valuable consideration, delivered the same so endorsed to these plaintiffs, and thereupon and thereby assigned, transferred, set over, and conveyed the said cotton and said bill of lading to these plaintiffs, and ordered the said cotton to be delivered to these plaintiffs by defendant at New Orleans aforesaid, by reason of

all which the said defendant became liable, and, being so liable, undertook, agreed, and promised to deliver the cotton aforesaid to these plaintiffs within a reasonable time after the said 6th day of November, 1883. Plaintiffs allege that one month from and after the date of said bill of lading, to wit, the said 6th day of November, 1883, was a reasonable and ample time for the delivery of said cotton, under the terms of the said promise and undertaking, by defendant, but though the said time has long since elapsed the said defendant, though often thereunto after requested, hath hitherto failed and refused and still doth fail and refuse to deliver the said cotton or any part thereof to these plaintiffs, who are the lawful owners thereof, whereby plaintiffs have been damaged in the sum of fifteen thousand dollars.

6 That the said defendant, fraudulently contriving to avoid its liability to these plaintiffs, pretends and alleges that the said cotton was not so delivered as in and by said bill of lading is recited and acknowledged, but that the said bill of lading was executed without the receipt by its said agent of any of said cotton, all of which said pretences on the part of the defendant plaintiffs allege are untrue; but they say that even if it be true that no cotton was delivered to said defendant as in and by said bill of lading is recited and acknowledged, yet is the defendant estopped from setting up that fact in defence of plaintiffs' cause of action upon said bill of lading, because these plaintiffs say that the said bill of lading was executed in form negotiable and transferrable by endorsement under the usage and customs of merchants, and that these plaintiffs, relying upon the validity of said bill of lading in all respects and upon the facts therein stated, that said cotton had been delivered to said defendant as aforesaid, and that defendant had contracted to carry and deliver said cotton as aforesaid, advanced to the said Joseph Lahnstein and paid out upon his order and at his request and in consideration of his said transfer of said bill of lading to these plaintiffs the sum of eight thousand dollars on, to wit, the 10th day of November, 1883, and that said payment was made and advanced upon the faith of the recitals and effect of said bill of lading as a contract to deliver the cotton therein mentioned as aforesaid, and that if the said cotton was never received by defendant, yet

7 ought it to be held to the terms of the said bill of lading for the indemnification of these plaintiffs for said payment, with interest thereon from the date thereof, because of the fraud practiced by the said agent upon these plaintiffs in the issuance of said bill of lading in the ordinary form and manner wherein he was authorized by the defendant to act, and defendants are estopped to deny that said cotton was received as against the claims of these plaintiffs for damages on account of defendant's failure to comply with said bill of lading to the extent of eight thousand dollars, with interest thereon, at the rate of 8 per cent. per annum, from the date of payment thereof as aforesaid; and if it be true, as alleged, that defendant received said cotton in said bill of lading mentioned, then plaintiffs claim of defendant the full value thereof, to wit, the sum of fifteen thousand dollars, with interest thereon from and after the 6th day of

December, 1883, when and before which time defendant should have delivered said cotton under said bill of lading, according to the true intent and meaning thereof.

Wherefore these plaintiffs sue and pray for citation against the said defendant and for judgment for their damages aforesaid, to the amount of fifteen thousand dollars, with interest thereon, at the rate of 8 per cent. per annum, from December 6th, 1883, and, in case defendants establish that said cotton was not in fact received, that these plaintiffs at least recover of and from the defendants
8 the aforesaid sum of eight thousand dollars, with interest thereon, at the rate of 8 per cent. per annum, from the 10th day — November, 1883, and for such other and further relief and process as unto the court shall seem meet and proper under the circumstances of the case.

SCOTT & LEVI,
Counsel for Plaintiffs.

Endorsed: J. Friedlander & Co. *vs.* The Texas & Pacific Railway Company. No. 12053. Plaintiffs' original petition. Scott & Levi, for plaintiffs. Filed Aug. 26, 1884. Alex. Easton, clerk D. C., G. Co.

Citation. Issued Aug. 29, 1884.

THE STATE OF TEXAS, *County of Galveston:*

In District Court. October Term, A. D. 1884.

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

You are hereby commanded to summon the Texas — Pacific Railway Company, if to be found in your county, by serving it with a copy of this writ, to be and appear before the honorable the judge of the district court for the twenty-sixth judicial district, at a district court to be holden in and for the county of Galveston, at the court-house, in the city of Galveston, on the first Monday in October, 1884, to answer the petition filed in said court on the 26th day of August, 1884, in cause No. 12053, J. Friedlander, Herman
9 Leopold, and Henry Viavant, composing firm of J. Friedlander & Co., plaintiff-, *vs.* Texas — Pacific Railway Company, defendant, wherein plaintiffs sue for damages in the sum of fifteen thousand dollars, which they allege they sustained by the failure of the defendant to deliver certain cotton as it agreed and undertook to do; hence they pray for damages aforesaid, interest, costs of suit, general relief, as is more fully set forth in plaintiffs' petition on file.

Herein fail not, and due return make of this writ.

Issued 29th day of August, 1884.

Witness Alex. Easton, clerk of the district court in and for said

county of Galveston, with the seal of said court, this 29th day of August, 1884.

Attest:
[SEAL.]

ALEX. EASTON,
Clerk District Court, Galveston Co.,
By EDWIN BRUCE,
Deputy Clerk.

Endorsed: No. 12053. J. Friedlander & Co. *vs.* The Texas & Pacific Railway Company. In district court. Citation. Issued this 29th day of August, 1884. Alex. Easton, clerk D. C., G. Co., by Edwin Bruce, deputy clerk.

Sheriff's Return.

Received this writ on the 29th day of August, 1884, at 10 o'clock a. m., and I executed the same on the 13th day of September, 10 188–, by delivering to the within-named defendant, The Texas — Pacific Railway Company, thro' W. H. Newman, agent, in person, in the county of Galveston, a true copy of this writ.

Sheriff's fee, $1.50, due.

WM. P. OWENS,
Sheriff Galveston County,
By GEO. J. TOWNSEND, *Deputy.*

Filed this 27th day of Sept., 1884.
ALEX. EASTON,
Clerk D. C., G. Co.
—— ——,
Deputy Clerk.

Original Answer. Filed Oct. 10, 1884.

In District Court, Galveston County; to October Term, A. D. 1884.

J. FRIEDLANDER & Co.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12053.

Now comes the defendant and pleads to the jurisdiction and says that this court has no jurisdiction over this defendant, and that the petition does not show any jurisdiction.

And, for demurrer, defendant says that the petition is wholly insufficient in law.

And, for answer, defendant denies all and singular the allegations in the petition contained.

BALLINGER, MOTT & TERRY,
Attorneys for Defendant.

Endorsed: No. 12053. In district court. J. Friedlander & Co. *vs.* Texas & Pacific Railway Company. Original answer.
11 Filed Oct. 10, 1884. Alex. Easton, clerk D. C., G. Co., by Edwin Bruce, deputy.

Agreed Statement of Facts. Filed Oct. 28, 1884.

"Original."

J. FRIEDLANDER & Co. *vs.* TEXAS & PACIFIC R'Y Co. } No. 12053.

Suit pending in the district court of Galveston county, Texas.

In this cause it is agreed, in order to save costs and simplify the proof—

1st. That on November 6th, 1883, at Sherman station, in Grayson county, Texas, on the Eastern Division of the Texas & Pacific R'y Co., E. D. Easton, agent for the defendant at said station, executed, as such agent, a bill of lading, of which a copy is hereto attached, and delivered the same to Joseph Lahnstein, the person named in the said bill of lading.

2nd. That said Easton was, at the time and place aforesaid, the regularly authorized agent of the said defendant for the purpose of receiving for shipment cotton and other freight for transportation by said railway company over and along its line from Sherman station aforesaid, and that said bill of lading was in the usual form and made out upon the usual printed blanks in use by the said defendant at said station, and that said Easton was authorized by said defendant to execute bills of lading for cotton and other freight by him received for the purpose of transportation by the defendant.

12 3rd. That the said Joseph Lahnstein endorsed said bill of lading by writing his name across the back thereof, and drew a draft on the plaintiffs in this cause on or about November 6th, 1883, of which a copy is hereto attached, for the sum of eight thousand dollars, payable at sight to the order of Oliver & Griggs, and attached said draft to said bill of lading so endorsed, and on or about November 6th, 1883, forwarded the same through said Oliver & Griggs for presentation to and payment by the plaintiffs in this cause; that in due course of business as bankers said Oliver & Griggs forwarded said draft with bill of lading attached to New Orleans, where the same was presented to and paid by said plaintiffs, say, on or about November 10th, 1883.

4th. That in paying said draft the said plaintiffs acted in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any knowledge of any fraud or misrepresentation connected with said bill of lading and draft, and with the full and honest belief that said bill of lading and draft were honestly and in good faith executed, and that the cotton mentioned in said bill of

lading had been in fact received by said defendant as represented in said bill of lading.

5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading signed by the said Easton, as agent aforesaid, shipped them by the said Joseph Lahnstein for sale by plain-
13 tiffs as commission merchants for account of said Lahnstein, and that the cotton so previously advanced upon was received by plaintiffs in the due course of transportation, pursuant to the terms of the bills of lading upon which they made advances respectively, and that the bill of lading of November 6th, 1883, was the first received by plaintiffs from said Lahnstein and not fulfilled by the defendant.

It is agreed, however, that either party may take evidence for the purpose of establishing the dates, amounts, etc., of said former drafts and bills of lading.

6th. That in point of fact said bill of lading of November 6th, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein, and without receiving any cotton for transportation such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; [That the said Easton and the said Lahnstein had fraudulently combined in one other case, whereby the said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received and which the said Easton had no expectation of receiving, the latter-named bill of lading having been given early in November, 1883;] that the plaintiffs in this suit had no knowledge whatever of the facts stated in this clause until after they had in good faith paid and advanced upon the faith of the bill of lading sued on and the draft thereto attached, to them presented as aforesaid, the sum of
14 $8,000.00, as hereinbefore stated.

(The facts stated in the sentence enclosed in brackets in clause six is objected to by plaintiffs as irrelevant and incompetent, but if held competent is admitted as a fact.)

7th. That the cotton mentioned in said bill of lading, had the same been actually received by defendant and forwarded to plaintiffs, would have been worth largely more than the amount so advanced by said plaintiffs as aforesaid—that is to say, would have been worth about $10,000.00—and that, except the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary and in the usual course of trade and in accordance with the usage and customs of merchants and shippers and receivers of cotton.

8th. That on said November 6th, 1883, and long prior thereto and ever since the headquarters and main offices of defendant were and have been connected by railroad and telegraph communication with all stations on defendant's railroads and with Sherman station aforesaid, among others.

9th. That the defendant is a corporation created and existing and domiciled as alleged in the petition.

SCOTT & LEVI, *Attorneys for Plaintiffs.*
BALLINGER, MOTT & TERRY,
Attorneys for Defendants.

15 (*Copy of Bill of Lading.*)

Cotton bill of lading, domestic, No. 99.

THE TEXAS & PACIFIC RAILWAY CO.,
SHERMAN STATION, EASTERN DIVISION, *November 6th*, 1883.

Received from Jos. Lahnstein two hundred bales of cotton in apparent good order, marked and numbered as below, to be transported from Sherman to New Orleans, La., and delivered to the consignees or a connecting common carrier.

The cotton aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood as part of the consideration for which the said cotton is received that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of the said cotton as though herein inserted at length, and especially that neither of said carriers or this company shall be liable for loss or damage of any kind occasioned by delays from any cause or by change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals, or rivers; and it is further especially understood that for all loss or damage occurring in the transit of the said cotton the legal remedy shall be against the particular carrier only in whose custody the said cotton may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said cotton to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transporta-
16 tion, whereby any legal liability or responsibility shall or may be incurred, that the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said cotton, either by the consignor or by the consignee or by any one on behalf of either, whether such insurance be by open, general, or special policy. All cotton will be subject to necessary baling, and is received at owner's risk of wet and dirt, and carriers will not be accountable for loss in weight arising from unavoidable causes; freight to be paid on

Original.

the actual gross weight ascertained by the companie's scales. Claims for damage must be reported by the consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice of claim for damages is not thus given, neither this

company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve to themselves the privilege of compressing all cotton signed for on this bill of lading. No liability will be assumed for wrong carriage or wrong delivery of cotton that is imperfectly marked.

Notice.—This contract is accomplished and the liability of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is
17 understood and agreed that the companies will be liable as warehousemen only thereafter, and unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival the cotton may be removed and stored by the company, at owner's risk and expense, in the warehouse of the company or one of its selection, and, after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for not less than ten days and sell the cotton, either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges.

In accepting this contract the shipper or other agent of the owner of the cotton carried expressly accepts and agrees to all its stipulations and conditions.

Rates guaranteed to New Orleans, La: X cts. per bale. 60 cts. per 100 lbs. Charges advanced, $——.	Consigned to order Jos. Lahnstein. Notify J. Friedlander & Co., New Orleans, La.

Number of bales.	Marks.	Tag numbers.	Weight, subject to correction.
One hundred	H A K		51,000
One hundred	P E T		50,600
			101,600

E. A. EASTON, *Ag't.*

(Endorsed on the back:) "Jos. Lahnstein."

18 (*Copy of Draft.*)

Oliver & Griggs, bankers.

$8,000.00. DALLAS, TEXAS, *November 6th*, 1883.

At sight pay to the order of Mess. Oliver & Griggs eight thousand dollars.

No. 35351. JOS. LAHNSTEIN.

To Mess. J. Friedlander & Co., New Orleans, La.

(Endorsed on the back:) Pay Chas. Palfrey — Co. or order for collection. Oliver & Griggs, Dallas, Texas.

(Endorsed:) J. Friedlander & Co. *vs.* Texas & Pacific R'y Co. No. 12053. Agreed statement of facts. Filed Oct. 28, 1884. Alex. Easton, clerk D. C., G. Co., by Edwin Bruce, deputy.

Petition for Removal to U. S. Cir. Court. Filed Nov. 7, 1884.

J. FRIEDLANDER & Co.
vs.
TEXAS & PACIFIC RAILWAY Co. } No. 12053.

Suit pending in the district court of Galveston county, State of Texas.

Petition for removal of cause to the United States circuit court.

The petition of the Texas & Pacific Railway Company (defendant in the above-entitled suit) respectfully represents to this honorable court that your petitioner at the time of the commencement of this suit was and still is a citizen of the State of Texas and that J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Company, plaintiffs in the above-entitled
19 suit, were at the time of the commencement of this suit and still are citizens of the State of Louisiana; that there is a controversy in the suit between citizens of different States, to wit, a controversy between J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Co., all of whom were at the commencement of this suit and now are citizens of the State of Louisiana, and the Texas & Pacific Railway Company, which was at the commencement of this suit and now is a citizen of the State of Texas; that the matter in dispute in this suit exceeds, exclusive of costs, the sum or value of five hundred dollars ($500.00); that the controversy in this suit is, as aforesaid, wholly between citizens of different States and can be fully determined as between them. Your petitioner makes and files herewith a bond with good and sufficient surety for its entering into the circuit court of the United States for the eastern district of Texas, sitting at Galveston, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court

shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond, and order the transfer of this suit to said circuit court of the United States for the eastern district of Texas, sitting at Galveston.

BALLINGER, MOTT & TERRY,
Attorneys for Petitioner.

20 UNITED STATES OF AMERICA,
State of Texas, County of Galveston:

J. W. Terry, being duly sworn, deposes and says that he is a member of the firm of Ballinger, Mott & Terry, and is one of the attorneys for the Texas & Pacific Railway Company, the petitioner named in the above petition, and that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

J. W. TERRY.

Subscribed and sworn to before me this 7th day of Nov'r, A. D. 1884.

[SEAL.] ALEX. EASTON,
Clerk D. C., G. Co.

Endorsed: No. 12053. J. Friedlander & Co. *vs.* The Texas & Pacific R'y Co. Petition for removal to U. S. circuit court. Filed Nov'r 7th, 1884. Alex. Easton, clerk D. C., G. Co.

Bond for Removal to U. S. Cir. Court. Filed Nov. 7, 1884.

In the District Court of Galveston County, State of Texas.

J. FRIEDLANDER & CO. *vs.* TEXAS & PACIFIC R'Y CO.

Bond for removal to the United States circuit court.

21 Know all men by these presents that we, The Texas & Pacific Railway Company, as principal, and —— ——, as sureties, are held and firmly bound under [unto] J. Friedlander, Herman Leopold, and Henry Viavant in the penal sum of five hundred dollars ($500.00); for the payment whereof, well and truly to be made, unto the said J. Friedlander, Herman Leopold, and Henry Viavant, their heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said Texas & Pacific Railway Company having petitioned the district court of Galveston county, State of Texas, for the removal of a certain cause therein pending, wherein the said J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Co., are plaintiffs and the said Texas & Pacific Railway Company is de-

fendant, to the circuit court of the United States in and for the eastern district of Texas, sitting at Galveston: Now, if the said Texas & Pacific Railway Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

22 Witness our hands this 25th day of October, A. D. 1884.

TEXAS & PACIFIC RAILWAY COMPANY,
By BAKER, BOTTS & BAKER, *General Attorneys.*
ROB'T BREWSTER.
B. B. WEEMS.

THE STATE OF TEXAS, *County of Harris:*

I, James Masterson, judge of the 21st judicial district, hereby certify that this is a good and sufficient bond for the amount therein stated, and that each of the sureties have property subject to execution of greater value than the amount stated in the bond.

To certify which I hereunto set my hand and affix the seal of the district court, at Houston, this the 25th day of October, A. D. 1884.

[SEAL.] JAMES MASTERSON,
Judge of 21st Dist. of Texas.

Endorsed: No. 12053. J. Friedlander & Co. *vs.* Texas & Pacific R'y Co. Bond for removal to U. S. circuit court. Filed Nov'r 7th, 1884. Alex. Easton, clerk D. C., G. Co.

Order of Court Removing Cause to U. S. Cir. Court.

J. FRIEDLANDER & CO. *vs.* TEXAS & PACIFIC R'Y CO. } No. 12053. Nov'r 8th, 1884.

23 This day come on to be heard the application of the defendant, The Texas & Pacific Railway Company, to remove this cause to the United States circuit court for the eastern district of Texas, at Galveston; and the defendant having filed its petition and bond for removal as aforesaid, said petition and bond being filed on the 7th day of November, 1884, and the said petition being in due form of law, and the said bond having been inspected and approved by the court, it is thereupon considered, ordered, and decreed by the court that this cause —, and the same is hereby, removed to the United States circuit court for the eastern district of Texas, at Galveston, and that the clerk of this court do make out a transcript of all the orders made and original papers filed in this cause and certify thereto and transmit the same to the said United States circuit court; and further ordered by the court that execution may issue against each party respectively for the costs by them and it in this behalf incurred.

Bill of Costs.

Clerk's fees:

Docketing suit		20
Issuing citation		75
Copying petition		
Filing papers		90
Entering appearance		15
Entering continuance		
Docketing motion or rule		
24 Entering order		
Entering discontinuance		
Entering nonsuit		
Entering default		
Assessing damage		
Affidavit, with certificate and seal		50
Subpœnas, witness		
Swearing witnesses		
Copy interrogatories and precept		
Copy interrogatories and commission		
Swearing and empanelling jury		
Receiving and recording verdict		
Entering interlocutory judgment		
Entering final judgment		1 50
Taking bond		
Taxing costs and copy		25
Execution and return		
Writ of attachment, transcript		14 00
		18 25
" sequestration		
" injunction		
" garnishment		
Jury tax		

Sheriff's fees:

Serving citation	1 50
" notice to take depositions	
Levying and returning execution	
Returning execution	
Jury fee	50
Taking bond	
Summoning witnesses	
Mileage	
25 Serving injunction	
" citation and garnishee	
Returning attachment	
" sequestration	
Appraising	
Advertising	

Bill of sale----------
Keeper's fee----------

20 25

THE STATE OF TEXAS, *County of Galveston:*

I, Alex. Easton, clerk of the district court of Galveston county, do hereby certify that this is a correct bill of costs as taxed against the — in cause No. 12053, J. Friedlander & Co. *vs.* Texas & Pacific R'y Co., in said court.

ALEX. EASTON, *Clerk.*

THE STATE OF TEXAS, *County of Galveston:*

I, Alex. Easton, clerk of the district court in and for the county of Galveston, State of Texas, do hereby certify that the foregoing 22 pages contain a true and correct transcript of all the proceedings had in said court in cause numbered 12053 and entitled J. Friedlander & Co., plaintiffs, *vs.* Texas & Pacific R'y Co., defendant, as all the same appears on file and of record in my office.

26 Witness Alex. Easton, clerk of the district court of Galveston county.

Given under my hand and official seal, at Galveston, on this the 23rd day of January, A. D. 1885.

[SEAL.] ALEX. EASTON,
Clerk of the District Court of Galveston County.

The foregoing transcript from the State district court of Galveston county is endorsed: "C. L. 1323. J. Friedlander & Co. *v.* Texas and Pacific Railway Co. Transcript from dist. court, Galveston Co. Filed M'ch 2, '85. C. Dart, clerk."

Appearance of Def't.

From the Minutes of the U. S. Circuit Court, at Galveston. March Term. March 2, 1885.

J. FRIEDLANDER & Co.
v.
TEXAS & PACIFIC RAILWAY CO. } 1323.

In this cause, removed from the district court of Galveston county, in which the transcript has been duly filed, on this day came the defendant, by attorneys, and entered its appearance in this court.

Agreement. Filed M'ch 13, '85.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

J. FRIEDLANDER & Co.
vs.
TEXAS & PACIFIC RAILWAY Co. } No. —.

27 In this cause it is hereby stipulated that the parties waive a jury and agree that the issues of fact may be tried and determined by the court without the intervention of a jury.

It is further agreed that the cause will be taken up for disposition after the jury cases are disposed of for the present term and not earlier than the first of April, 1885.

SCOTT & LEVI,
Counsel for Plaintiffs.
BALLINGER, MOTT & TERRY,
Counsel for Defendant.

Endorsements: "1323. Friedlander & Co. *vs.* Texas Pacific R. Co. Agreement. Filed M'ch 13, '85. C. Dart, clerk."

Case Set.

From the Minutes, March Term. April 10, 1885.

Ordered that the following cases be set for trial on Tuesday, April 14th, 1885, to be called according to priority of number.

* * * * * * *

J. FRIEDLANDER & Co.
v.
TEXAS & PACIFIC R'Y Co. } 1323.

* * * * * * *

Leave to Def't to Amend.

From the Minutes, M'ch Term. April 23, 1885.

J. FRIEDLANDER & Co.
v.
TEXAS & PACIFIC RAILWAY Co. } 1323.

Upon application leave is given the defendant to amend.

28 *Amended Answer. Filed Ap'l* 24, '85.

J. FRIEDLANDER & CO.
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Suit pending in the circuit court of the United States for eastern district of Texas, at Galveston.

Now comes the defendant and, by leave of the court first had and obtained, amends its answer, and for further and additional answer, says—

That one E. D. Easton, on the 6th of November, 1883, was the station agent of defendant at Sherman station, in Grayson county, Texas, on the Eastern Division of defendant's line in Texas, and that as such agent he was authorized to receive cotton and other freight for transportation and to execute bills of lading for such cotton and other freight by him received for the purpose of transportation by defendant.

That on the said 6th day of November, 1883, the said Easton, combining and confederating with one Joseph Lahnstein, did fraudulently and collusively sign a certain bill of lading purporting to be his act as agent of defendant, whereby he falsely represented that defendant had received from the said Joseph Lahnstein two hundred bales of cotton in apparent good order, to be transported from Sherman to New Orleans, La., and did deliver the said false bill of lading to the said Joseph Lahnstein; and defendant says that in point of fact the said bill of lading was executed by the said Easton fraudulently and collusively with the said Lahnstein without receiving any cotton for transportation, such as was represented in
29 said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that the said pretended bill of lading was the one that is set out in the petition of the plaintiffs and was false, fraudulent, and fictitious and was not executed by defendant nor by its authority, and that the said Easton only had authority as agent aforesaid to execute a[illegible] deliver bills of lading for freights actually received by him for transportation.

Wherefore defendant prays judgment, etc.

BALLINGER, MOTT & TERRY,
Att'ys for Defendant.

Endorsements: "C. L. 1323. J. Friedlander & Co. *vs.* Texas & Pacific R'y Co. Amended answer. Filed April 24th, 1885. C. Dart, clerk."

Agreement. Filed April 25th, 1885.

In the Circuit Court of the United States for the Eastern District of Texas.

J. FRIEDLANDER & CO.
v.
TEXAS & PACIFIC R'Y CO. } No. 1323 C. L.

Now come the parties, plaintiff and defendant, and file this a supplemental and additional agreement of facts, which is to be added to and taken as part of the statement of facts filed in this cause on October 28th, 1884.

It is agreed that the fact was and is that on November 10th, 1883, the Joseph Lahnstein mentioned in said agreed statement of facts filed October 28th, 1884, was insolvent, and that he has been
30 insolvent ever since said 10th day of November, 1883, and is so now.

SCOTT & LEVI, *Counsel for Plaintiffs.*
BALLINGER, MOTT & TERRY,
Counsel for Defendant.

Endorsements: "C. L. 1323. J. Friedlander & Co. *vs.* Texas & Pacific R'y Co. Agreement. Filed April 25, 1885. C. Dart, clerk."

Case Heard & Submitted.

From the Minutes, Nov. Term. Nov. 19, 1885.

J. FRIEDLANDER & CO.
v.
TEXAS AND PACIFIC R'Y COMPANY. } 1323.

On this 19th day of November, 1885, came the parties to this suit, by their attorneys, and waiving a jury in writing and filed, submitted the questions of fact, as well as of law, to the court; and, the issues being joined and the parties having agreed upon the facts, after argument, the case was submitted to the court upon the pleadings and the agreed statement of the facts.

Judgment.

From the Minutes, Nov. Term. Nov'r 20, 1885.

J. FRIEDLANDER & CO.
v.
TEXAS AND PACIFIC RAILWAY COMPANY. } 1323.

31 This cause came on to be heard at this term, the parties appearing by their attorneys; and, the parties having waived

a trial by jury by agreement signed by them in writing and filed, the above entitled and numbered cause came on to be tried and determined by the court on the issues of fact as well as of law, and upon the pleadings and the agreed statement of facts; and the court having heard the pleadings and the evidence and argument of counsel, and being sufficiently advised in the premises, upon due consideration the court finds for the defendant. Wherefore it is considered and adjudged by the court that the plaintiffs take nothing by their suit, and that the defendant go hence without day and recover of the plaintiffs all costs about this suit incurred, and have execution therefor.

It is further ordered that execution may issue against each party for the costs by them incurred.

Plaintiffs' Bill of Exceptions Filed Nov'r 20, 1885.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

J. FRIEDLANDER & Co.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 1323.

Be it remembered that on the 20th day of November, 1885, at a term of the above-named court, then in session, the parties
32 having waived a trial by jury by agreement signed by them in writing, the above entitled and numbered cause came on to be tried and determined by the court on the issues of fact as well as of law, & upon the pleadings and the agreed statement of facts, which said agreed statement of facts is as follows, to wit:

1st. On November 16th, 1883, at Sherman station, in Grayson county, Texas, on the Eastern Division of the Texas & Pacific Railway Company, E. D. Easton, agent for the defendant at said station, executed as such agent a bill of lading, of which a copy is hereinafter given, and delivered the same to Joseph Lahnstein, the person named in said bill of lading.

2nd. That said Easton was at the time and place aforesaid the regularly authorized agent of the defendant for the purpose of receiving for shipment cotton and other freight for transportation by defendant over and along its line from Sherman station aforesaid, and that said bill of lading was in the usual form and made out upon the usual printed blanks in use by said defendant at said station, and that said Easton was authorized by said defendant to execute bills of lading for cotton and other freight by him received for the purpose of transportation by the defendant.

3rd. That the said Joseph Lahnstein endorsed said bill of lading by writing his name across the back thereof and drew a draft on the plaintiffs in this cause on or about November 6th, 1883 (of which draft a copy is hereinafter given), for the sum of eight thou-
33 sand dollars, payable at sight to the order of Oliver & Griggs, and attached said draft to said bill of lading so endorsed, and

on or about Nov. 6th, 1883, forwarded the same through said Oliver & Griggs for presentation to and payment by the plaintiffs in this cause; that in due course of business Oliver & Griggs forwarded said draft, with bill of lading attached, to New Orleans, where the same was presented to and paid by plaintiffs on or about November 10th, 1883.

4th. That in paying said draft said plaintiffs acted in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any knowledge of any fraud or misrepresentation connected with said bill of lading and draft, and with the full and honest belief that said bill of lading and draft were honestly and in good faith executed, and that the cotton mentioned in said bill of lading had been in fact received by said defendant as represented in said bill of lading.

5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading, signed by the said Easton as agent aforesaid, for cotton shipped them by said Joseph Lahnstein, for sale by plaintiffs as commission merchants for account of said Joseph Lahnstein, and that the cotton so previously advanced upon was received by plaintiffs in the due course of transportation, pursuant to the terms
of the bills of lading upon which they made advances re-
34 spectively, and the bill of lading of November 6th, 1883, was
the first received by plaintiffs from said Lahnstein and not fulfilled by defendant.

Sixth. That, in point of fact, said bill of lading of November 6th, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that said Easton and said Lahnstein had fraudulently combined in one other case, whereby said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received, and which the said Easton had no expectation of receiving, the latter-named bill of lading having been given early in November, 1883, but that plaintiffs in this suit had no knowledge whatever of the facts stated in this (sixth) clause until after they had in good faith paid and advanced upon the bill of lading sued on and the draft thereto attached, to them presented as aforesaid, the sum of $8,000.00, as hereinbefore stated.

Seventh. That the cotton mentioned in said bill of lading (of November 6th, 1883), had the same been actually received by defendant and forwarded to plaintiffs, would have been worth largely more than the amount so advanced by said plaintiffs as aforesaid—
that is to say, would have been worth about $10,000.00, and
35 that, except that the cotton was not received nor expected to be
received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary and in the usual course of trade and in accordance with the

usage and customs of merchants and shippers and receivers of cotton.

Eighth. That on said November 6th, 1883, and long prior thereto and ever since, the headquarters and main offices of defendant were and have been connected by railroad and telegraph communication with all stations on defendant's railroad and with Sherman station aforesaid, among others.

9th. That the defendant is a corporation created and existing and domiciled as alleged in the petition.

10th. That on November 10th, 1883, said Joseph mentioned above was insolvent, and that he has been insolvent ever since and is so now.

The following is a copy of the bill of lading above referred to:

Cotton Bill of Lading, "Domestic," No. 99.

THE TEXAS & PACIFIC RAILWAY CO.,
SHERMAN STATION, EASTERN DIVISION, *November 6th*, 1883.

Received from Jos. Lahnstein two hundred bales of cotton in apparent good order, marked and numbered as below, to be transported from Sherman to New Orleans, La., and delivered to the consignees or a connecting common carrier.

36 The cotton aforesaid may pass through the custody of several carriers before reaching its destination. It is understood, as part of the consideration for which the said cotton is received, that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of the said cotton as though herein inserted at length, and especially that neither of said carriers or this company shall be liable for loss or damage of any kind occasioned by delays from any cause or by change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals, or rivers; and it is further especially understood that for all loss or damage occurring in the transit of the said cotton the legal remedy shall be against the particular carrier only in whose custody the said cotton may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company in receiving the said cotton to be forwarded as aforesaid assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said cotton, either by the consignor or by the
37 consignee or by any one on behalf of either, whether such insurance be by open, general, or special policy. All cotton

will be subject to necessary baling, and is received at owner's risk of wet and dirt, and carriers for loss in weight arising Original. will not be accountable from unavoidable causes; freight to be paid on the actual gross weight as ascertained by the company's scales. Claims for damage must be reported by the consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice of claim for damages is not thus given, neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve to themselves the privilege of compressing all cotton signed for on this bill of lading.

No liability will be assumed for wrong carriage or wrong delivery of cotton that is imperfectly marked.

Notice.—This contract is accomplished and the liability of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehouse-
37½ men only thereafter, and unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival the cotton may be removed and stored by the company, at owner's risk and expense, in the warehouse of the company or one of its selection, and, after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for—less than ten days and sell the cotton either at that point or at such point on its line as it may select, and out of the proceeds of such sale pay all charges.

In accepting this contract the shipper or other agent of the owner of the cotton carried expressly accepts and agrees to all its stipulations and conditions.

Rates guaranteed to New Orleans, La.: X cts. per bale. 60 cts. per 100 lbs. Charges advanced, $——.	Consigned to order Jos. Lahnstein. Notify J. Friedlander & Co., New Orleans, La.

Number of bales.	Marks.	Tag numbers.	Weight, subject to correction.
One hundred------	H A K-----	----------	51,000
One hundred------	P E T-----	----------	50,600
			101,600

E. D. EASTON, *Ag't.*

(Endorsed on the back:) "Jos. Lahnstein."

38 The following is a copy of the draft above referred to:

Oliver & Griggs, bankers.

Texas. $8,000.00. DALLAS, TEXAS, *November 6th*, 1883.

At sight pay to the order of Messrs. Oliver & Griggs eight thousand dollars.

No. 35351. JOS. LAHNSTEIN.

To Messrs. J. Friedlander & Co., New Orleans, La.

Endorsed on the back: Pay Chas. Palfrey — Co. or order for collection. Oliver & Griggs, Dallas, Texas.

Upon which said agreed statement of facts and the pleadings the cause was submitted to the court for decision, the plaintiffs asking judgment in their favor thereupon against the defendant.

But the court, having duly considered the cause upon said agreed statement of facts and the pleadings, gave judgment thereupon in favor of the defendant, and to the action of the court in so doing the plaintiffs excepted, and now make and tender this bill of exceptions and asks that the same may be allowed and signed and sealed by the presiding judge, and filed and made part of the record in this cause, which is accordingly ordered.

DON A. PARDEE, *Judge.*

39 Endorsements: "No. 1323. In U. S. circuit court. J. Friedlander & Co. *vs.* The Texas and Pacific R'w'y Co. Plaintiffs' bill of exceptions. Filed Nov. 20th, 1885. C. Dart, clerk."

Application for Severance. Filed Dec'r 24, '85.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

J. FRIEDLANDER & CO.

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

In this cause the plaintiffs, J. Friedlander and Herman Leopold, respectfully show that since the institution of this suit the copartnership existing between themselves and the plaintiff, Henry Viavant, has been dissolved, the said Henry Viavant retiring from and ceasing to be a member of the firm; that the said J. Friedlander and Herman Leopold desire to sue out and prosecute a writ of error to the Supreme Court of the United States from the judgment rendered in this cause by this honorable court, and that their coplaintiff, Henry Viavant, refuses to join them in suing out and prosecuting such writ of error.

They respectfully ask that notice and summons be issued by this honorable court to the said Henry Viavant, accompanied by a copy of this motion, and requiring him, if he desires, to join the said
40 J. Friedlander and Herman Leopold in said proposed proceedings in error, and that in default of his so doing within thirty days after receiving such notice the said J. Friedlander and Herman Leopold may be allowed to sue out and prosecute said writ of error independently of said Henry Viavant.

SCOTT & LEVI,
For the Plaintiffs, J. Friedlander and Herman Leopold.

Ordered, That this motion be filed, and that notice as prayed be issued, to be served by the marshal of the eastern district of Louisiana and returnable in thirty days, requiring the plaintiff, H. Viavant, to join in the proceedings in error within thirty days after service of such notice, and in default thereof that the plaintiffs, J. Friedlander and H. Leopold, may proceed without said Viavant.

C. B. SABIN,
U. S. District Judge for the Eastern District of Texas.

Galveston, Texas, Dec'r 24, 1885.

Endorsements: "No. 1323. In U. S. cir. court. J. Friedlander & Co. *vs.* The Texas & Pacific Railway Co. Application for severance. Filed Dec'r 24, 1885. C. Dart, clerk."

Notice of Writ, &c.

From the Minutes, Nov. Term. Dec'r 24, 1885.

J. FRIEDLANDER & Co.
vs.
41 TEXAS & PACIFIC RAILWAY Co. } 1323.

Motion and application of J. Friedlander and Herman Leopold for service of summons on Henry Viavant, late a member of said firm, of desire to prosecute a writ of error to the Supreme Court. Filed Dec'r 24, 1885.

Order.

Ordered, That this motion be filed, and that notice as prayed be issued, to be served by the marshal of the eastern district of Louisiana and returnable in thirty days, requiring the plaintiff, H. Viavant, to join in the proceedings in error within thirty days after service of such notice, and in default thereof that the plaintiffs, J. Friedlander and H. Leopold, may proceed without said Viavant.

C. B. SABIN,
U. S. District Judge for the Eastern District of Texas.

Galveston, Texas, Dec'r 24, 1885.

Writ of Error to Supreme Court. Issued Feb'y 9, '86.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before
42 you, at Galveston, Texas, between J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Co., plaintiffs, and The Texas and Pacific Railway Company, defendant, in which a final judgment was rendered on the 20th day of November, 1885, that plaintiffs take nothing by their suit, and that defendant go hence without day and recover its costs, a manifest error hath happened, to the great damage of the said J. Friedlander, Herman Leopold, and Henry Viavant, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second

Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice
[SEAL.] of the said Supreme Court, the 9th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

C. DART,

43 *Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.*

Allowed by—
DON A. PARDEE, *Judge.*

Endorsements: "C. L. No. 1323. J. Friedlander & Co. *vs.* Texas and Pacific Railway Company. Writ of error to Supreme Court. Filed Feb'y 9th, 1886. C. Dart, clerk."

Bond of Plaintiffs on Writ of Error to Supreme Court. Filed Feb'y 9, '86.

Know all men by these presents that we, J. Friedlander and Herman Leopold and Henry Viavant, as principals, and Leon Blum and Sylvain Blum, as sureties, are held and firmly bound unto Texas and Pacific Railway Company in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Texas and Pacific Railway Company, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this ninth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a regular term of the circuit court of the United States for the eastern district of Texas, at Galveston, in a suit depending in said court between J. Friedlander, Herman Leopold, and
H. Viavant, composing the firm of J. Friedlander & Co.,
44 plaintiffs, and The Texas and Pacific Railway Company, defendant, a final judgment was rendered against the said plaintiffs on the 20th day of November, 1885, that plaintiffs take nothing by their suit and that defendant go hence and recover its costs, and the said J. Friedlander and Herman Leopold and Henry Viavant, the said plaintiffs, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Texas and Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said J. Friedlander and Herman Leopold and Henry Viavant shall prosecute their writ of error to effect and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

J. FRIEDLANDER. [L. S.]
HERMAN LEOPOLD. [L. S.]
H. VIAVANT. [L. S.]
LEON BLUM. [L. S.]
SYLVAIN BLUM. [L. S.]

Approved by—
DON A. PARDEE, *Judge.*

45 Endorsements: "C. L. No. 1323. J. Friedlander & Co. *v.* Texas and Pacific Railway Company. Bond of plaintiffs on writ of error to Supreme Court. Filed Febr'y 9, 1886. C. Dart, clerk."

Citation on Writ of Error to Supreme Court. Filed Febr'y 13, 1886.

THE UNITED STATES OF AMERICA:

The President of the United States of America to The Texas and Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, wherein J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Co., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of February, in the year of our Lord one thousand eight hundred and eighty-six (1886).

[SEAL.] DON A. PARDEE, *Judge.*

46 On this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared S. V. Patrick, U. S. deputy marshal, eastern dist. of Texas, before me, the subscriber, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, and makes oath that he delivered a true copy of the within citation to William P. Ballinger, a member of the firm of Ballinger, Mott & Terry, attorneys of record of the defendant, The Texas and Pacific Railway Company, at Galveston, in person, on this 13th day of Feb'y, 1886.

S. V. PATRICK,
U. S. Dep'ty Marshal E. D. T.

Sworn to and subscribed the 13th Febr'y, A. D. 1886.

[SEAL.]

C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

Endorsements: "C. L. No. 1323. J. Friedlander & Co. *v.* Texas and Pacific Railway Company. Citation on writ of error to supreme court. Returned & filed Febr'y 13th, 1886. C. Dart, clerk."

Copy Writ of Error to Supreme Court Filed Febr'y 12, 1886.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern dis-
47 trict of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at Galveston, Texas, between J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Co., plaintiffs, and The Texas and Pacific Railway Company, defendant, in which a final judgment was rendered on the 20th day of November, 1885, that plaintiffs take nothing by their suit, and that defendant go hence without day and recover its costs, a manifest error hath happened, to the great damage of the said J. Friedlander, Herman Leopold, and Henry Viavant, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

48 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 9th day of February, in the
[SEAL.] year of our Lord one thousand eight hundred and eighty-six.

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—
DON A. PARDEE, *Judge.*

A true copy of the original writ of error issued in said cause, I certify.

[SEAL.] Witness my hand and seal of said circuit court, at Galveston, Febr'y 12, '86.

C. DART, *Clerk.*

The foregoing copy of writ of error endorsed as follows:

C. L. No. 1323. J. Friedlander & Co. *v.* Texas and Pacific Railway Company. Copy writ of error to Supreme Court. Original endorsed: Filed Febr'y 9th, 1886. C. Dart, clerk. This copy deposited in the clerk's office for the defendant in error. Febr'y 12, 1886. Attest: C. Dart, clerk. Filed Feb'y 12th, 1886. C. Dart, clerk.

49 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston, Texas.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all the proceedings in cause No. 1323 on the law docket of said court, entitled J. Friedlander & Co. *vs.* Texas and Pacific Railway Company, as the same now appears on file and of record in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 19th day of February, A. D. 1886.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., at Galveston.

Endorsed on cover: E. Texas C. C. U. S. No. 236. J. Friedlander, Herman Leopold, and Henry Viavant, composing the firm of J. Friedlander & Company, plaintiffs in error, *vs.* The Texas and Pacific Railway Company. Filed March 20, 1886.

Supreme Court, U. S.
FILED,
MAR 19 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 236.

J. FRIEDLANDER, HERMAN LEOPOLD, AND HENRY VIAVANT, COMPOSING THE FIRM OF J. FRIEDLANDER & CO., PLAINTIFFS IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Brief in behalf of the Plaintiffs in Error.

STATEMENT OF THE CASE.

The plaintiffs in error, who are commission merchants doing business at New Orleans, advanced $8,000, November 10, 1883, upon the bill of exchange, with bill of lading annexed, found upon pp. 20 to 22 of the printed record.

The defendant, The Texas Pacific Railway Company, is a corporation created and existing under an act of the Congress and the laws of Texas.

cf. Record, cl. 9, p. 20 with p. 2.

16 U. S. Stat. at Large, 573-9. Laws Texas 1871 pp. 318-325.

The circumstances surrounding the transaction are stated in the supplemental answer of the defendant (p. 16), and in

an agreed statement of the facts, recited at length in the decision of the court below (pp. 18 *et seq.*)

It appears that this was the last of a series of transactions of a similar character, in all of which the plaintiffs and the defendant were interested. These transactions were alike, not only in respect to the nature of the business, but also in the method of their performance and as to the names which appear on the paper.

(Ag't, cl. 6, p. 18.)

It also appears that the plaintiffs advanced this money in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any fraud or misrepresentation connected with said bill of lading and draft, *and with the full and honest belief* that said bill of lading and draft were honestly and in good faith executed, and that the cotton had been in fact received by the defendant as stated in said bill of lading.

(Ag't, cl. 4, cl. 6, p. 19.)

It further appears that Easton, the station agent at Sherman, Texas (Ans., p. 16), was supplied by the defendant with the usual printed blank bills of lading in use on the defendant's railway (Ag't, cl. 2, p. 18), bearing the name of the defendant, a designation and number (p. 20), and that the transaction of all business of this sort was solely confided to him at that station.

And thereupon the plaintiffs claim that the defendant is estopped (Petition, p. 3) from setting up the defense stated in its answer (p. 16), and the maker of the bill of exchange and the endorser of the draft being insolvent (Ag't, cl. 10, p. 20), and the cotton said to have been received by the defendant being worth more than the face of the draft at its maturity (Ag't, cl. 7, p. 19), they are entitled to recover of the defendant the amount presently due on said draft—that

is to say, the sum of $8,000, and interest, at eight *per centum*, from November 6, 1883.

ERRORS ASSIGNED.

In that upon the agreed statement of facts and the pleading, judgment should have been rendered for the plaintiffs in error to recover the sum of $8,000 and interest at the rate of eight per centum from November 6, 1883.

I.

The question is simply one of estoppel by conduct; and while the case at bar is in some respects identical with some adjudicated cases, in other respects it differs from any which have found their way into the reports:

(*a*) In the respect that there had been former dealings between the parties—differing only in matters of minor detail—all fulfilled according to the letter of the contract.

(*b*) In respect to the furnishing to Easton, the station agent of the defendant at Sherman, the usual printed blanks in use by the defendant in the prosecution of its business, thus conferring upon him actual authority to make and deliver contracts of affreightment, conjoined to an accountable receipt; this printed paper had only to be filled in with the name of the shipper and a description of the goods and their destination to be made ready for delivery as the evidence of an elaborate contract as to the terms upon which the carriage was to be performed by the defendant, and bearing the corporate name of the defendant, the designation and number which the corporation had seen fit to give it.

(*c*) In that the bill of lading, at the time of its issue was subjected to the operation of the peculiar laws of the State of Texas, defining how contracts of this sort should be interpreted.

(*d*) In that it is not pretended that no cotton was received by Easton, the station agent. The defense is that no cotton was received by him, "for transportation." Such as is contemplated

Petition, p. 3, ans. p. 16, ag't, p. 19.

(*a*)

In view of the fact that the defendant is presumed to know the use to which these blanks could be put by Easton, and had actual knowledge that the same blanks had been used in similar transactions with the plaintiffs, this present transaction is to be considered with reference to its having been accomplished with full knowledge on the part of the defendant as to what the "usual course of business" of the plaintiffs was, as to making advances on shipments of cotton from Sherman station.

(Ag't, cl. 4, p. 19.)

Martin *vs.* Webb, 110 U. S., 7.

(*b*)

It appears that the defendant, as a common carrier, knew that the commerce of the country is largely dependent upon the facility of exchange afforded by the use of drafts and accompanying bills of lading (Ag't cl. 7, p. 19). Yet, with its main offices in constant and instantaneous communication with this particular station (Ag't, cl. 8, p. 20), no precaution was taken to prevent the improper use of this blank contract. There was not even the slightest attention given to this important matter; not even the most feeble effort was made by the defendant to prevent these genuine documents, bearing its corporate name, designation, and number, containing its acknowledgement of the receipt of property and its obligations in respect thereto, from being made the instruments of fraud. The defendant selected this person to stand before the commercial world at that place as the corporation itself, to act as its representative, not in the sense that an agent represents his principal, but in the larger and

more comprehensive sense of being "a governing force of the corporation itself."

He was held out to its customers and the public as entitled to confidence.

This was not a forgery "out of whole cloth" by Easton. Without the assistance and co-operation of the defendant itself, it would have been impossible to have obtained the plaintiffs' money.

The defendant acted with great negligence in carelessly placing these instruments of so much possible evil into the uncontrolled possession of Easton.

By endorsing the words "non-negotiable" upon the printed blanks furnished to Easton, the defendant could have relieved itself from liability to loss if it had desired to do so.

Carr *vs.* London Railway Co., L. R., 10 C. P., 307.
Batavia B'k *vs.* N. Y., L. E. & W. R. R. Co., 106 N. Y., 195.

Particularly was this duty incumbent on the defendant in view of the statute of Texas, 1883, section 8, which was a re-enactment of article 283, Rev. St., providing that the trip "shall be considered as having commenced from the time of the signing of the bill of lading."

(*c*)

It is conceded, (ag't, cl. 9, p. 20,) that the defendant is a corporation existing and domiciled as alleged in the petition.

The petition, (p. 2,) alleges that the defendant is a private corporation, created by an act of Congress and existing in the State of Texas under said act, and by authority of the laws of said State, and having its principal office at Marshall, Texas.

This concession undoubtedly imposes upon the corporation, all the liabilities and limitations, which the legislature of that State has seen fit to prescribe.

But even if it is to be treated as a foreign corporation, the legislature had the power to prescribe the terms upon which it should carry on its business in that State.

Angel & Ames on Corp., 265, and cases cited.
Morawetz on Corp., 505, and cases cited.
Cooper Manufacturing Co. *vs.* Fergusan, 113 U. S., 727.

This was a "Texas" contract.

Bulger *vs.* Roche, 11 Pick., 36.
Brooke *vs.* Erie R. R. Co., *post.* 53 Md 616

By the law of that State, the contract took effect "from the signing of the bill of lading."

(*d*)

The defendant was a common carrier.

Easton was its station agent at Sherman.

The bill of lading was in usual form.

The transaction was according to usual course of trade.

The plaintiffs acted honestly and in good faith.

Therefore, the receipt of the cotton *by the defendant* as recited in the bill of lading will be presumed until the contrary appears in accordance with maxim "*Ommia praesumuntur rite et solemniter esse, donec probetur in contrarium.*"

It does not appear that no cotton existed, or that it was entirely a fictitious transaction; it only appears that no cotton was received by him "FOR TRANSPORTATION," and that he did not expect to receive any "SUCH COTTON." This is a very different thing from saying that no cotton was received at all.

The petition, (p. 3) declares it to be true that the cotton was received by the agent, the answer p. 16, admits that the bill of lading represents that the defendant received the cotton, but alleges that it was not received "for transportation." This averment of the answer is to be construed according to the rule laid down in Stephens Pl., 381.

The agreement as to facts follows the allegation of the answer. In construing the pleadings, full force and effect should be given to every word, and the only vitality, which the words above quoted can have, in qualifying the character of the cotton, in view of the above maxim, and the established rule as to pleadings, is to interpret the defense to be, that the cotton was in existence at Sherman station, when Easton signed the bill of lading, but that he did not intend to have it transported: and that the bill was for that reason, fraudulent and collusive.

This raises the question as to whether the defendant is liable to innocent third parties, who are deceived by the statements of a bill of lading issued by it, through its station agent, if at the time of the issue of the bill and the receipt of the property, the station agent intended to convert the property, instead of forwarding it.

Boston Bank Cases, 10 Ct. Cl., 519.
96 U. S., 30.

It will appear from the cases cited hereafter in the discussion of other questions, that by all the authorities the carrier is liable under such circumstances.

II.

It will be observed that the only question presented by the pleadings and the agreed statement of facts, is whether the defendant is estopped from denying the statements in the bill of lading.

Liability is not sought to be fixed upon the defendant for the amount of this draft by reason of the agency of Easton, in the ordinary legal significance of that word.

By reference to section 7 of defendant's charter, it will be seen that the power is conferred upon the defendant to appoint officers and to make and enforce rules for the regulation of its business.

As a corporation it must necessarily act through the intervention of natural persons; at the station of Sherman, Easton was *the* station agent; for all matters connected with the business for which this corporation was created, he acted not *for* the defendant, but *as* the defendant itself.

This consideration so aptly pointed out in the case of Pollard, *vs.* Vinton, 105 U. S., 7, distinguishes it from the class of cases which have been determined upon the question of agency between natural persons.

Pollard *vs.* Vinton, except as to the pleadings and the laws of Texas and the prior dealing and the neglect of the defendant to protect itself by endorsement on the bill, and except as to the fact that the carrier here is an artificial person, is quite similar to the case now under consideration.

The court in that case was very careful to say that the rule there announced would not necessarily govern in the case of a carrier corporation upon the one hand and innocent third persons on the other. Mr. Justice Miller says:

> Counsel for plaintiffs however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, etc.

The closing words of that decision, are as follows:

> Whatever may be the true rule which characterizes the actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power, by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent.
>
> In the other case, *the officer is the corporation*, for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or com-

mitting any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the action of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or the corporators, it is also true, that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think the case of the R. R. Co. *vs.* Schuyler presents a rule for this case. The judgment of the circuit court is affirmed.

III.

The reported cases on the subject of the liability of carriers upon bills of lading, where innocent third persons have advanced money thereon, may be divided into three classes.

First. There are a class of cases, of which Grant *vs.* Norway, 10 C. B , 665, is the first and best illustration, where the *master of a vessel* had executed a bill of lading for goods not actually received by the ship. In due course it passed through the hands of innocent purchasers for value and the controversy was between the owners of the ship and the endorsee of the bill. This case was considered to present strictly a maritime contract, and the rights and authorities of the master are defined by reference to well established principles of maritime laws.

Maritime contracts are governed by the maritime law, and are *sui generis*. Mr. Parsons in his work on shipping and admiralty, Chap. 7, Sec. 1, says:

A ship as the great instrument of commerce, may be regarded as of great importance, not only to its immediate owner, but to the community, and the public policy or general expediency to promote and assist the perfect use and employment of the ship in the commercial interchange of commodities between distant nations, has a considerable effect upon the law of shipping. * * * Many of the rights of the owner and master of a ship on the one hand and of shippers of the goods on the other, if they do not arise from this policy, are nevertheless affected by it, and owe to it

whatever modifications cause them to differ from what they would be under the ordinary rules of the law of contracts.

In other words, considerations of public policy and national welfare have developed peculiar features in the maritime laws.

The crowning glory of England is not her productions, but her commerce; hence the decisions of the English courts have tended toward the protection of ships and ship owners.

There is a marked distinction between foreign commerce carried on in ships, and internal commerce accomplished through the media of railroads.

A ship is a rover, absent and free from the control of the owner as soon as she leaves port. She passes absolutely and unconditionally into the hands of her husband—the master; he is supreme in authority. If he could unqualifiedly and unconditionally bind his ship or its owners, either at home or foreign ports, great complications would ensue, hence the doctrine of the maritime law, established long prior to the case of Grant *vs.* Norway, was that he who deals with the master should be held to ascertain the facts upon which he proposes to act.

The station agent of a railroad company is in no wise analagous to the master of a ship.

In the selection of a master, his physical condition, his skill and expertness as a seaman, his intelligence and his integrity are to be taken into consideration.

In the selection of a station agent, nothing is to be considered except his honesty and intelligence.

Second. There are a class of cases which like *Pollard vs. Vinton, supra*—and of which it is the best illustration—have been decided upon questions of *pure agency between natural persons*, a consideration necessarily entering into the decision of cases of the first class.

It goes without saying, that as between natural persons, when a contract is signed by one natural person, in the name

of and as agent for another, all persons are put upon inquiry as to the extent and scope of the assumed authority.

Third. There are a class of cases where the carriers are corporations, and which are like the case at bar excepting in those particulars above alluded to, growing out of the prior dealings of these parties and the claimed negligence of the defendant.

In this class, the very great preponderance of reason (Daniels on Neg. Inst. 1733), and authority favors the contention of the plaintiff.

Upon the one hand are to be found the decisions of the courts of New York, Connecticut, Pennsylvania, Kansas, Nebraska, and Illinois.

Armour *vs.* R. R. Co., 65 N. Y., 111.
Batavia Bk. *vs.* R. R. Co., 106 N. Y., 195.
Relyea *vs.* Rolling Mill Co., 42 Conn., 579.
Brooke *vs.* R. R. Co., 108 Pa. St., 529.
Savings B'k *vs.* R. R. Co., 20 Kansas, 519.
McNeal *vs.* Hill., Woolw. 96.
Fremont B'k *vs.* R. R. Co., 10 Nebraska, 556.
Larned *vs.* R. R. Co., 103 Ill., 293.

Upon the other hand and to the contrary are the decisions of the courts of Maryland, North Carolina, and the circuit court of Tennessee, E. D.

Wilkins *vs.* B. & O. R. R. Co., 44 Md., 11.
Williams, Black & Co. *vs.* The W. & W. R. R. Co., 93 N. C., 42.
Robinson *vs.* M. & C. R. R. Co., 7 Fed. Rep., 129.

The legislature of Maryland immediately passed a law attempting to do away with this decision fraught with so much threatened injury to the commerce of that State.

Maryland laws, 1876.

In none of the cases last above cited were the considerations here presented urged upon the attention of the court. They were treated as presenting questions of agency simply—and decided nothing further.

The distinction so aptly pointed out in the closing paragraphs of Pollard *vs.* Vinton, *supra*, seems to have been overlooked.

The same may be said of the *obiter dicta* of Mr. Justice Matthews in the very recent case of Knight *vs.* R. R. Co., 122 U. S. 79.

The question there arose as to the effect of the words "contents unknown" appearing upon the face of the bill of lading.

Miller *vs.* R. R. Co., 90 N. Y., 430, also cited by the learned Justice does not support the *arguendo*, quite the contrary.

Upon the point hereinbefore made as to the neglect of defendant in not so wording its contract as to negative liability, this case contains a pregnant negative, to wit; that without such restricting words the defendant would be liable.

Later on, the case of Pollard *vs.* Vinton, is cited to the the same proposition. Quite clearly, therefore, the distinctive point made here was not considered; very naturally was this the case, for the question here raised was not submitted to the consideration of the court, as appears from the brief of the counsel.

IV.

It remains therefore to consider exactly what Easton's relation to the defendant at Sherman station was.

The answer of the defendant states that he was an officer, and it appears that he was "placed in control as the governing force of the corporation" at that point.

The defendant could not be "charged with any intelligent action, or with entertaining any purpose, or committing any

fraud," at that place, "except as that purpose or that fraud was evidenced" by the action of Easton.

The distinction between the powers of an agent to bind his principal, when the principal is a natural person, and the power of an officer of a corporation to bind it, is quite apparent from its description.

Chief Justice Marshall defines it as "an artificial being, invisible, intangible, and existing only in contemplation of law," (4 Wheat., 636), in this somewhat modifying the definition of Kyd (Kyd on Corp. 13), as is well pointed out.

Morawetz on Corp. § 1.

The first and important distinction between natural and artificial persons is that the former ordinarily contract by themselves without the intervention of other natural persons; the latter must act through the media of natural persons or they do not act at all.

A moment's consideration will dispel the obscurity which exists, because the name "agent" is so universally given to those who act as the corporation itself.

The ordinary meaning of the word "agent" is that of a person who acts in the place of another, where that other person could and might have himself acted.

This is not altogether true of the agents of corporations, as was pointed out by Mr. Justice Miller in the quotation from his opinion, given *ante*.

Daniels Neg. Inst., 389.

Undoubtedly a corporation can have an agent in the usual and ordinary meaning of that term; but we have seen that in some instances they are held to be the corporation itself, and their acts to be its acts. Possibly the distinction between the two capacities may depend upon whether the particular act is a discretionary one, one which the officer is not bound to perform, or an act which he is bound to perform; whether or not he is charged with carrying into effect a duty imposed upon the corporation by its organization.

If this is the proper distinction it is quite plain that the defendant, under its charter, could be compelled to perform the service of the carriage of goods for hire, and it was a duty of the highest character, so far as the public is concerned, that the station agent should receive and forward goods.

High. Ex. Leg. Rem., 276.

I suggest that the true rule is that a natural person acts as an agent for his principal, a corporation, in relation to those things which, by its charter, the corporation *may* perform, and as the corporation itself, when he acts as to those things which the corporation must perform.

This question turns upon the determination as to what Easton's real relation to the defendant was when he issued the bill of lading.

Was it that of a mere agent, in the sense of a substituted authority, or was he the "arm" of this artificial person, a definite member of its body?

In considering this subject it is very difficult to perceive why the famous case of Merchants' B'k *vs.* State B'k, 10 Wall., 604, is not controlling and decisive.

In that case the cashier of the defendant certified a check to be "*good*," when the drawer had no funds. Mr. Justice Swayne there laid down the rule, as applicable to all corporations, as follows:

Where a party deals with a corporation in good faith, and the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

There is an apparent similarity between banking corporations and railway corporations, in that it is designed that the

temporary custody of property shall be surrendered to each under an obligation that it be returned after the performance of a specified service.

And also a decided similarity between cashiers and tellers of banks and station agents of railways, such as Easton was.

In this view, a further quotation from the case last cited is apposite:

The question we are now considering is the authority of a cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. (3 Mass., 506'; 19 Maine, 234; 12 N. H., 556; 7 Hill, 91; 15 Pa. St., 172; 26 Maine, 428; Pars. Select Cases, 182; 8 Wheat., 360.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. (1 Hill, 501; 7 Hill, 94; 14 Barb., 358; 14 N. Y., 524; 3 Hill, 262; 19 N. Y., 156.)

Those dealing with a bank in good faith have a right to presume integrity on the part of its officers when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In Barnes *vs.* Ontario B'k, 19 N. Y., 156, the cashier had issued a false certificate of deposit. In the Farm. & M. B'k *vs.* Butch. & Drovers' B'k, 14 N. Y., 624; S. C., 16 N. Y.,

133, and in Meade *vs.* B'k, 25 N. Y., 146, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

The same case presents the law of estoppel *in pais* so aptly that it may be properly cited in full:

Estoppel in pais presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon a consideration that the author of the misfortune shall not himself escape the consequence and cast the burden upon another. (7 H. & M., 603; 1 Salk., 289.)

Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations, it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result. (3 Hill, 216.)

Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there was any misleading, ought to suffer rather than the other party. (16 N. Y., 123; 8 Wend., 489.)

In Bank U. S. *vs.* Davis, 2 Hill, 465, Nelson, Ch. J., said: "The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud."

The reasoning of Justice Selden in the Farm. & Mech. Bank *vs.* the Butchers and Drovers Bank, *supra*, is also strikingly apposite in the case before us. He said, "the bank selects its teller, and places him in a position of great responsibility. Persons having no voice in his selection, are obliged to deal with the bank through him; it therefore, while acting in the business of the bank and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in the R. R. Co. *vs.* Schuyler, 38 Barb., 536, S. C., affirmed, 34 N. Y., 30.

It was explicity laid down by Lord Holt, in Hern *vs* Nichols,, 1 Salk., 289. He there said: "For seeing some-

body must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver, should be a loser than a stranger;" and upon this the plaintiff had a verdict.

* * * * *

To the same effect are numerous authorities not cited in the above opinion.

Drew *vs.* Kimball, 43 N. H., 285.
N. Y. &c. R. R. Co. *vs.* Schuyler, 34 N. Y., 30.
Morawetz on Corporations, sec. 65, and cases cited.

The same rule applies when a purchase or sale of property, or non-negotiable contract, is made by an agent of a corporation.

Morawetz on Corporations, sec. 65, and cases cited.

And a corporation is liable for the deceit or false representation of its agent.

Morawetz on Corporations, sec. 91, and cases cited.

V.

Certificates of stock in corporation and bills of lading have certain characteristics in common. In Bank *vs.* Lanier, 11 Wall., 377, Mr. Justice Davis said: "Stock certificates of all kinds have been constructed in such a way as to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities; * * although neither in form nor character negotiable paper they approximate to it as nearly as practicable." This is quite an accurate description of bills of lading as well as of the uses to which they are put, and their negotiability.

Other obvious similarities need only be suggested. Neither can be put afloat except through the intervention of "agents," and yet where the "agent" of the corporation has fraudulently or improperly issued such certificates, even if the issue carries the total amount of stock beyond that which

was authorized by the charter, the corporation is liable to innocent third persons who are misled by the transaction.

Bank *vs.* Lanier, *supra.*
Bridgeport Bank *vs.* N. Y. & N. H. R. R. Co., 30 Conn., 231.
N. Y. &c. R. R. Co. *vs.* Schuyler, 34 N. Y., 30.
Holbrook *vs.* N. J. Zinc Co., 57 N. Y., 618.
Sturges *vs.* Bank of Circleville, 11 Ohio St., 153.
Cocheco National Bank *vs.* Haskell, 51 N. H., 116.

VI.

When a corporation acts upon a given subject-matter through an officer, it acts directly and not mediately, as in the case of a natural person, who may act through an agent; therefore the act of a corporate "agent" is quite similar to the act of one partner, in the absence of his associates. One partner may transact business within the scope of the partnership; in this he acts directly, and it is well settled that if representations of certain facts are fraudulently made by one partner, unknown to the others, in the partnership business, and the facts never existed, but the whole statement is a mere fiction, the firm will be bound to the same extent as if it were true and the facts existed.

Rapp *vs.* Lathan, 2 Barn. & Ald., 795.
Hume *vs.* Bolland, Ry. & Moo., 371.
Beach *vs.* State Bank, 2 Ind., 488.
Doremus *vs.* McCormick, 7 Gill, 49.
Sweet *vs.* Bradley, 24 Barb., 549.
Hawkins *vs.* Appleby, 2 Sand., 421.
Griswold *vs.* Haven, 25 N. Y., 595.
French *vs.* Rowe, 15 Iowa, 563.

VII.

Supposing the defendant to have been a natural person, and to have with its own hand signed the bill of lading in the present case, under the facts as they appear here, if the plaintiffs had advanced their money on Lahnstein's draft there could be no question as to the liability of the defendant.

It is submitted, in all confidence, that the issue of the bill of lading must be treated as the direct act of the corporation, and it is therefore by every consideration of public policy, common sense, and strict justice estopped from alleging the facts which it has attempted to set up as against these confessedly innocent parties.

A. G. SAFFORD,
For Plaintiffs in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 236.

J. FRIEDLANDER, HERMAN LEOPOLD and HENRY VIAVANT, Composing the Firm of J. FRIEDLANDER & COMPANY,

Plaintiffs in Error,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY.

ARGUMENT FOR DEFENDANT IN ERROR.

JOHN F. DILLON,

Of Counsel.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1888.

J. FRIEDLANDER, HERMAN LEOPOLD, and Henry Viavant, composing the firm of J. Friedlander & Company,

Plaintiffs in Error,

AGAINST

THE TEXAS AND PACIFIC RAILWAY COMPANY.

No. 236.

ARGUMENT FOR THE DEFENDANT IN ERROR.

Statement.

The writ of error brings up for review here, the judgment of the Circuit Court of the United States for the Eastern District of Texas, rendered November 20, 1885, upon a stipulation of facts in substance as follows (Record, pp. 6–8, 17, 18–22):

On November 6, 1883, at Sherman Station, in Grayson County, Texas, on the Eastern Division of the Texas and Pacific Railway, E. D. Easton, the company's station agent at that point, executed and de-

livered to one Joseph Lahnstein, a bill of lading purporting to acknowledge the receipt by the Railway Company from said Lahnstein, of 200 bales of cotton to be transported to New Orleans.

This bill of lading was endorsed by Lahnstein, who drew a draft on the plaintiffs in error for the sum of $8,000, payable at sight to the order of Oliver & Griggs, bankers, and attaching the bill of lading thereto forwarded it through the last-named firm for presentation and payment.

In due course, on or about November 10, 1883, the draft was presented to the plaintiffs in error, who paid it in good faith, relying upon the recitals of the bill of lading attached.

In point of fact, however, the bill of lading was executed and delivered by Easton

> "fraudulently and by collusion with said Lahnstein, and without receiving any cotton for transportation such as represented in the bill of lading, and without the expectation on the part of said Easton of receiving any such cotton."
>
> Rec., p. 7.

Plaintiff in error brought suit against the Railway Company to recover $8,000 the amount advanced to take up the draft, with interest. The action was begun in the District Court of Texas in and for the County of Galveston, on August 26, 1884, and subsequently on November 8, 1884, removed into the Circuit Court of the United States for the Eastern District of Texas, where judgment was rendered on November 20, 1885, dismissing the plaintiffs' petition with costs (Record, pp. 17–18).

Thereupon plaintiffs sued out this writ.

ARGUMENT.

The liability of the Railway Company depends ultimately upon the authority of the agent Easton to execute and deliver bills of lading, for goods not actually in his possession for transportation; and further, whether, if there be no such authority, the fact that the agent was guilty of fraud in the execution and delivery of the bills, operates to fix upon the carrier a responsibility which would not otherwise exist.

Our argument falls naturally into two divisions as follows:

I.

The agent of the Railway Company had no authority to issue bills of lading for cotton not actually received by him for transportation, and bills so issued cannot impose any liability upon the Railway Company to deliver the goods therein described; but it may be shown even as against an innocent endorsee for value, that no goods were ever received for carriage.

It appears from the statement of facts as stipulated, that the agent of the defendant company issued the bill of lading sued upon, without receiving or expecting to receive for transportation the cotton described therein (Rec., p. 7).

That bills so issued are invalid as an unauthorized assumption of power not delegated to the agent, unless by special instruction, and a fraud upon the Railway Company which releases it from all liability in respect of the

goods mentioned therein, even at the suit of a *bona fide* endorsee for value, has been so repeatedly held by the Courts both of England and America as to render the law upon the subject unassailable, and the question of reliance by the consignee upon the faith of the bill of lading is wholly immaterial and does not in the slightest degree affect the carrier's liability for non-delivery of goods which it never received for shipment under the bills.

Lickbarrow vs. Mason, 2 T. R., 77.
Grant vs. Norway, 2 Eng. L. and Eq., 337.
Hubbersty vs. Ward, 18 *Id.*, 551.
Brown vs. Powell Duffryn Co., L. R., 10 C. P., 562.
The Freeman vs. Buckingham, 18 How., 182.
The Loon, 7 Blatchf., 244.
Robinson vs. Memphis, &c., Ry. Co., 9 Fed. R., 129; S. C., 16 Fed. R., 57.
Pollard vs. Vinton, 105 U. S., 7.
Sears vs. Wingate, 3 Allen, 103.
B. & O. R. R. vs. Wilkens, 44 Md., 11.
Hunt vs. Miss. Cent. R. Co., 29 La. Ann., 446.
Louisiana Bank vs. Laveille, 52 Mo., 380.
Williams vs. R. R. Co., 93 N. C., 42.
See Chandler vs. Sprague, 38 Am. Dec., 407, note.
Cox vs. Bruce, L. R., 18 Q. B. Div., 147.
St. Louis, Iron Mountain & Southern Ry. Co. vs. Knight, 122 U. S., 79.

The principle was first laid down in Lickbarrow vs. Mason, where BULLER, J., makes use of the following language in giving the opinion of the Court:

"A bill of lading is an acknowledgment by the cap-

tain of having received the goods *on board his ship;* therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board, and the consignee would be entitled to his action against the captain for his fraud."

The point came up rather more clearly in the case of Grant vs. Norway, *ut supra*, where Lord Chief-Justice JERVIS says, upon p. 341 :

" The general usage gives notice to all people that the authority of the captain to give bills of lading *is limited to such goods as have been put on board, and the party taking the bill of lading either originally or by endorsement of the goods, which have never been put on board, is bound to show some particular authority to the Master to sign the bill in that form.*"

This is a leading case, and has been followed in the later English decisions down to and including Cox vs. Bruce, *ut supra*, and in the Federal and State Courts of the United States generally.

The earliest Massachusetts case, Walker vs. Brewer, 11 Mass., 99, was, however, decided before Grant vs. Norway, through enunciating the same doctrine.

The Supreme Court adopted this view first in the case of The Freeman vs. Buckingham, in 18 Howard.

Says Mr. Justice CURTIS, upon p. 191 :

" But the master of a vessel has no more an apparent, unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one, to sign bills of lading for cargo *actually shipped* and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises; but the authority in *each case* arises out of and depends on a particular state of facts; it is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, *even in favor of an innocent purchaser;* if the facts upon which his power de-

pended did not exist; *and it is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends.*"

In the later case of Pollard vs. Vinton, 105 U. S., 7, Mr. Justice MILLER, following this decision, lays down the following "*elementary truths*" which aptly express the *rationale* of the entire doctrine.

He says (p. 8), of the nature and character of a bill of lading:

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property *on board* his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods lie at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.*"

Commenting upon *The Freeman vs. Buckingham*, he then continues (p. 11):

"And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. *The very question of the power of the agent to bind the owner by a bill of lading for goods never received and of the effect of such a bill of lading as to innocent purchasers without notice were discussed and properly within the case and were decided adversely to the principles on which the plaintiff's counsel insist in this case.*"

In B. & O. R. R. vs. Wilkens, 44 Md., at p. 23, MILLER, J., says:

"If any doctrine of commercial law can be regarded as well settled it is that the master has no authority to sign a bill of lading for goods *not actually put on board* the vessel, and, therefore, the owner of the ship is not responsible to parties taking or dealing with or making advances on the faith of such an instrument, which is untruthful in this particular."

In Wingate vs. Sears (3 Allen, 103), Judge HOAR lays down the rule thus (p. 107):

"When the master is acting within the limits of his authority, the owners are estopped in like manner with him; *but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually on board.*

(*Ib.*, p. 108): "The giving a bill of lading for goods which are not shipped, whether separately or by including them with others actually on board, is a violation of the master's duty and unwarranted by his employment. The responsibility of the owners to the consignee unless the shipper is the agent of the consignee is not upon the contract, but *results exclusively* from the possession of the goods *under an obligation to deliver* them safely to their owner."

The last expression of the doctrine as adopted in this Court, is contained in the well considered opinion of MR. JUSTICE MATTHEWS in the case of Iron Mountain Railway vs. Knight, 122 U. S., 79.

In that case cotton was actually transported by the carrier, but it was not of the grade indicated in the bills. The rule applicable both to cases where no goods at all were received and where the goods received and carried were different from those described in the bill, was held to be the same, the cause of action in each case arising out of the *non-delivery* of the goods specified in the bill of lading.

Said MR. JUSTICE MATTHEWS, delivering the opinion of the Court, at p. 87:

"If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bill of lading, *it is clear that the plaintiff would not be liable* for the deficiency. This is well established by the cases of *The Schooner Freeman vs. Buckingham*, 18 How., 182, and *Pollard vs. Vinton*, 105 U. S., 7."

Although many of the leading authorities laying down this rule in the fullest and broadest manner, are admiralty cases, the doctrine is held equally applicable to railway and other inland carriers.

B. & O. R. R. Co. vs. Wilkens, 44 Md., 11.
Robinson vs. Memphis, &c., R. Co., 9 Fed. R., 129; S. C., 16 Fed. R., 57.
Hunt vs. Miss. Cent. R. Co., 29 La. Ann., 446.
Miller vs. Hannibal & St. Jo. R. R. Co., 90 N. Y., 430.
St. Louis, Iron Mountain & Southern Ry. Co. vs. Knight, 122 U. S., 79 (87).

Says MILLER, J., in B. & O. R. R. Co. vs. Wilkens, at p. 25:

"A bill of lading is a very ancient, but not exclusively a *sea*, document. It has been long used in both countries by carrying companies in transportation on lakes and rivers, by steamboats as well as sailing vessels, and on canals, and in all such cases it has been demonstrated and treated as a commercial instrument. In later times similar documents have been commonly if not universally used by railway companies in land carriage. What good reason exists why the principle should not apply to them, as well as to bills of lading used in shipping? We see none."

Mr. Justice MATTHEWS, in the case of Iron Mountain Ry. Co. vs. Knight, 122 U. S., at p. 87, reiterates the rule thus:

"And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as carriers by sea."

The doctrine above stated has become so well known, and has been so generally applied that we deem it unnecessary to enter into any further discussion of the grounds upon which it is based.

II.

The question of active fraud or collusion upon the part of the agent, in issuing the bill of lading, is not material, and in no wise interferes with the application of the general rule to this case.

The sixth paragraph of the agreed statement of facts contains the following (Rec., p. 7) :

"6th. That in point of fact said bill of lading of Nov. 6, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein, and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of said Easton of receiving any such cotton ; that the said Easton and the said Lahnstein had fraudulently combined in one other case whereby said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received.

There is no stipulation, finding or claim, that the Railway Company knew of such collusion.

In the great majority of cases involving the question here raised, the agent or ship's master signing the bills of lading has done so either through innocent mistake or as a result of imposition practiced upon him by the consignors. There are, however, many cases in which the agent or master has been guilty of complicity in the fraud ; and in such cases it has been held that the fact of such fraud on the part of the agent did not and could not impose any liability upon the principal.

B. & O. R. R. vs. Wilkins, 44 Md., 11.
Robinson vs. Memphis &c. R. Co., 9 Fed., 129.

Coleman vs. Riches, 29 Eng. Law and Equity, 333.

See also

The Freeman vs. Buckingham, 18 How, 182.
Pollard vs. Vinton, 105 U. S., 7.

This follows from the rule recognized and applied by this Court in Pollard vs. Vinton, 105 U. S., at p. 8, where Mr. Justice MILLER says:

"*The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or to deliver.*

In other words, the liability of the carrier depends upon the actual receipt of the goods, and until such receipt, all acts by the agent are outside of his authority and of no effect as against the carrier, either *ex contractu* or *ex delicto*.

We shall briefly refer to several of the decisions applying the general rule stated in our Point I., to cases where the agent has been guilty of willful fraud:

In B. & O. R. R. vs. Wilkins, *supra*, the agent issued false bills, his object being to defraud the consignees named therein. The plaintiffs pleaded their good faith as innocent endorsees, and sought to hold the company liable, upon the alleged negotiable character of the instruments themselves.

MILLER, J., delivering the opinion of the Court, said (p. 27):

"Neither a railroad company nor a ship-owner can be made liable in a case like this, upon any theory that these instruments are negotiable like bills of exchange. The liability in either case must depend on the question of the authority of the master or agent to bind his principal by such acts. And, as we have seen, it has

been conclusively settled that no such authority exists, and that every one taking such instruments or making advances on the faith of them must be regarded as having notice of this want of authority, and acts at his own risk and on the responsibility of the master or agent alone, for damages as to the truthfulness of the statements appearing on the face of such documents, that the specified goods have beed shipped or received at the depot for transportation."

The case of Coleman vs. Riches, 29 Eng. Law and Equity, 323, is very much in point. There the defendant, a wharfinger, had an agent, one Board, duly authorized to execute and deliver certificates of receipt for all goods deposited upon the wharf. Board colluded with one of Coleman's customers and issued to him a certificate for certain goods which had, in fact, never been received at the wharf. This certificate was presented to Coleman, and paid by him in good faith in reliance of the statements contained therein. In an action subsequently brought against the wharfinger a nonsuit was directed.

Said Lord Chief-Justice JERVIS:

"It has been taken for granted or conceded that the evidence warrants the inference that it was known to Riches that it was usual for the plaintiff to direct that goods should be delivered at his (Riches') wharf, and that a receipt should be given for them, and also that Riches knew that Coleman was in the habit of paying the price, on getting the receipt which had been given at the wharf. But there was no evidence from which it could be inferred, as between Coleman and Riches, that Riches agreed to give the vendee of corn vouchers of the delivery on which the vendee should act. Had there been such an agreement it would have made the case very different, because Riches then would have undertaken to deliver vouchers to Coleman, and to employ proper persons to give such vouchers to him. But there is no evidence of anything of the kind. It was only the case of a wharfinger whose duty it is on

delivery of goods to give a receipt note. That consideration really disposes of the case, because Board had authority on the evidence only to give receipts for goods which were in fact delivered. * * *

"Now, we must see in this case, as in all other cases, whether the act in question was within the scope of the authority given to the party against whom the action is brought. Here the agent was not acting in the due course of his business or professing so to do. He did not act for his master, but in contravention of his duty to him and against his interest. If this Court was right in the case of *Grant vs. Norway* in holding that the master of a ship cannot bind his owners by professing to have authority to give bills of lading for goods which have not been shipped, when he has only authority to give such bills for goods actually shipped, the plaintiff in this case cannot recover against the defendant. *Grant vs. Norway* must be taken be taken as a proper decision. It has been acted upon in a case in the Exchequer (*Hubbersty vs. Ward*), and it is only an illustration of a well-known rule."

In the case of Pollard vs. Vinton, 105 U. S., 7, there was some evidence of fraud practised by Cobb & Co., the general agents of the ship-owners, who issued bills of lading for goods never received.

This Court, speaking through Mr. Justice MILLER, said (p. 9):

"But if we can suppose there was testimony from which the jury might have inferred either mistake OR BAD FAITH ON THE PART OF COBB & CO., we are of opinion that Vinton, the ship-owner, is not liable for the false statements in the bill of lading, because the transaction was not within the scope of their authority. If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:

"'During the month of December, 1873' (the date of the bill of lading) 'the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis *with power to solicit freights and to execute and deliver to shippers, bills of lading for freight shipped on defendant's steamboat Ben Franklin.*'"

This authority to execute and deliver bills of lading has two limitations, namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment the contract of carriage had commenced, and the evidence of it in the form of a bill of lading, would be binding.

But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms.

The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point."

In Robinson vs. Memphis, &c., R. Co., 9 Fed. R., 129, the case was this: The freight agent of the Railroad Company, by the procurement of one Chiles, a cotton buyer, fraudulently signed a bill of lading for certain bales of cotton, which were not on hand at the time, and were never delivered to the Railroad Company for carriage. Plaintiffs, the consignees, having paid the draft upon the faith of the bill, sued the railroad for non-delivery of the cotton. The Court held that there

could be no recovery. HAMMOND, Dist. J., in an elaborate and able opinion (p. 132) says:

"I cannot see that it is material whether this agent, trustingly confided in the misrepresentations or promises of Chiles, or whether he fraudulently conspired with him to do the wrong. * * *

(p. 133.) "A bill of lading is issued primarily as an evidence of an executory contract to carry, and the acknowledgment of the receipt of the goods for that purpose is only incidental—the mere averment of a fact for the purpose of founding thereon the contract to carry. * * *

It seems to me, with all deference, that it is a misapprehension of the true character of this instrument, and of the true relation of the parties to it, to treat it as if the maker were engaged in the business of issuing negotiable securities, which he is bound to protect at all hazards in the hands of *bona fide* purchasers for value; or as it is expressed in argument here, to protect those who innocently and in good faith deal with it. *This entails a liability dehors the contract.*"

It makes the carrier an insurer or guarantor of strangers to the contract against loss incurred by a use of the instrument in which the carrier has no interest, and binds him to a liability for which he is not paid, for the comparatively small sum he receives as compensation for carriage will not and is never intended to cover or insure him against loss incurred by such liability as that. The consideration he receives is not commensurate with the liability sought to be imposed, and if it is determined to exist, carriers must necessarily add to the freight a sum sufficient to indemnify them, as insurance companies are; and this for the protection of outside parties dealing in matters not pertaining to the carriage of the goods. Moreover, it obstructs the carrier in his proper business and entails upon him the selection of agents possessing not only the ordinary mental and moral qualifications essential to the receiving, handling and carriage of merchandise, but those having the relatively higher qualifications required of bank cashiers or other agents entrusted with the duty of issuing, signing and handling bank notes, negotiable bonds or like securities. It does not seem to me in the interest of commerce to compel car-